

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

ACCRETIVE TECHNOLOGY GROUP,  
INC., a Washington corporation ,

Plaintiff,

v.

ADOBE SYSTEMS, INC., a Delaware  
corporation,

Defendant.

Case No. C15-309RSM

ORDER GRANTING IN PART AND  
DENYING IN PART DEFENDANT'S  
MOTION TO DISMISS

**I. INTRODUCTION**

This matter comes before the Court on Defendant's Motion to Dismiss Amended Complaint. Dkt. #11. Defendant Adobe Systems, Inc. ("Adobe") argues that this matter should be dismissed under Rule 12(b)(6) for failure to state a claim upon which relief can be granted. *Id.* Specifically, Defendant asserts that Plaintiff, Accretive Technology Group, Inc. ("ATG") entered into a contract whose strict language explicitly waived any warranty or legal recourse for Plaintiff to bring suit. *Id.* Plaintiff opposes the Motion, arguing that it has alleged facts sufficient for the Court to find that Defendant breached the contract or was alternatively unjustly enriched, was negligent in its representations, violated the Consumer Protection Act, and violated the duty of good faith and fair dealing. Dkt. #14 at 6. For the reasons set forth below, the Court GRANTS IN PART AND DENIES IN PART Defendant's Motion.

## II. BACKGROUND

In 2012, Plaintiff corporation ATG began searching for a software product that would assist ATG in sending marketing emails to customers. Dkt. #9 at 2. ATG met and spoke with several companies who sold such software, including Neolane, Inc. (“Neolane”). *Id.* Neolane was later acquired by Defendant Adobe. Dkt. #9 at 5; Dkt. #11 at 7.

According to Plaintiff’s Amended Complaint, ATG and Neolane had numerous communications and meetings prior to the purchase of a license for Neolane’s software (“Software”). Dkt. #9 at 3. Neolane representatives came to ATG’s Seattle office and met with ATG’s computer system technicians. *Id.* ATG alleges that “Neolane’s representatives repeatedly stated and assured Accretive’s representatives that its Software would work and perform on Accretive’s computer system. Specifically, Neolane representatives assured Accretive that Neolane’s Software would function on a MySQL database...” *Id.*

On December 21, 2012, ATG and Neolane entered into a “Software License and Maintenance Agreement” (“Agreement”). Dkt. #12-1. The Agreement states in its “Recitals” section that, subject to the terms and conditions contained therein, Neolane grants ATG a right to use the Software, provides maintenance service if purchased by ATG, and provides “in particular installation” and “parameterization” if purchased by ATG. *Id.* at 4.

The Agreement contained several warranties and limitations of warranty. Plaintiff alleges that Neolane “through its representatives and written materials, including the Software License Agreement, expressly warranted that the Neolane software would function on the Accretive computer system as intended and designed, and that [Defendant] would cause it to so function on the Accretive computer system.” Dkt. #9 at 8-9. Plaintiff alleges that Neolane “expressly warranted in the Software License Agreement that the Neolane Software would comply with the technical information and documentation made available when the Neolane

1 Software was delivered. *Id.* at 9. Plaintiff alleges that the Agreement provides warranty  
2 procedures for ATG to follow if it has problems with the Software, including the opportunity  
3 for ATG to have its payments returned to it. *Id.* Plaintiff alleges that Defendant breached all of  
4 these warranties. *Id.*

5 Section 9 of the Agreement is titled “Warranty.” Dkt. #12-1 at 9. Section 9.1 states  
6 that Neolane “warrants that the Software delivered to [Plaintiff] will substantially comply with  
7 the Documentation and that the medium on which the Software as delivered is free from  
8 material defects...” *Id.* Section 9.2 states that Neolane “undertakes to perform the obligations  
9 incumbent on it under the Agreement in accordance with normal practices and with due care  
10 and attention as befitting a professional.” Section 9.4 clarifies that Neolane “does not warrant  
11 that the functions contained in the Software will meet the requirements of Licensee or that the  
12 operation of the Software and updates will be error free. Additional statements such as those  
13 made in advertising or presentations, oral or written, do not constitute warranties by Neolane  
14 and should not be relied upon as such.” *Id.* Section 9.6 provides, in bold, all capital lettering:

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18 LICENSEE ACKNOWLEDGES THAT NEOLANE’S  
19 OBLIGATIONS AND LIABILITIES IN RESPECT OF THE  
20 PRODUCTS ARE EXHAUSTIVELY DEFINED IN THIS  
21 AGREEMENT. LICENSEE AGREES THAT THE EXPRESS  
22 OBLIGATIONS AND WARRANTIES MADE BY NEOLANE  
23 IN THIS AGREEMENT ARE IN LIEU OF, AND TO THE  
24 EXCLUSION OF, ANY WARRANTY, CONDITION, TERM,  
25 UNDERTAKING OR REPRESENTATION OF ANY KIND,  
26 EXPRESS OR IMPLIED, STATUTORY OR OTHERWISE  
27 RELATING TO ANYTHING SUPPLIED OR PROVIDED OR  
28 SERVICES PERFORMED UNDER OR IN CONNECTION  
WITH THIS AGREEMENT INCLUDING (WITHOUT  
LIMITATION) AS TO THE CONDITION, QUALITY,  
PERFORMANCE, SATISFACTORY QUALITY OR FITNESS  
FOR PURPOSE OF THE PRODUCT(S) OR ANY PART  
THEREOF.

*Id.*

1 Section 20 of the Agreement states that “this Agreement shall constitute the entire  
2 understanding between the Parties . . . .The Agreement supersedes all prior agreements,  
3 understandings and other guarantees with regard to the subject matter of this agreement.” *Id.* at  
4 13.

5 An addendum to the Agreement entitled “Product Schedule No. 001” indicates that  
6 ATG purchased one year of maintenance, effective December 31, 2012, and lists an  
7 “Installation address.” *Id.* at 15. The addendum states that ATG was to pay \$529,530.00,  
8 which included \$95,315.40 for prepayment of annual maintenance fees. *Id.* at 16. Plaintiff  
9 alleges that it was required to pay \$534,530 upfront, prior to delivery of the Software, and prior  
10 to receiving technical documentation. Dkt #9 at 3. Plaintiff alleges that the Agreement  
11 provided no specifications or documentation regarding the Software and its specific capacities  
12 requirements, limitations, features and other technical information. *Id.* at 4.

15 Plaintiff alleges that, on or about January 23, 2013, ATG and Neolane entered into a  
16 Technical Services Schedule, which stated that Neolane would “complete high-level systems  
17 architecture of the integration of the Neolane Software into Accretive’s technology  
18 infrastructure... install the Neolane Software onto Accretive’s systems, and... configure the  
19 Neolane Software in a variety of other specified ways to conform it to the performance needs  
20 and technical requirements of Accretive.” *Id.* at 4.

22 On July 17, 2013, Neolane/Adobe delivered the Software to ATG and accompanying  
23 technical documentation. *Id.* at 5. Plaintiff alleges that the technical documentation  
24 accompanying the Software stated that the Software would function on a MySQL database. *Id.*

26 Despite repeated efforts of Neolane/Adobe and ATG to install the Software, the  
27 Software would not function on ATG’s computer system. *Id.*

1 On March 14, 2014, Adobe notified ATG that it could not cause the Software to work  
2 on ATG's computer system because of ATG's use of an incompatible MySQL database  
3 management system. *Id.* at 5-6. Adobe suggested that ATG change its database management  
4 system. *Id.* at 6. In response, ATG demanded that Adobe return to ATG all payment for the  
5 Software. *Id.* Adobe refused. *Id.*

6  
7 ATG received invoices from Neolane/Adobe for "service," asking for \$7,437.50 dated  
8 May 31, 2013, and \$4,356.25, dated June 28, 2013. *Id.* ATG paid these invoices. *Id.*

9 On January 28, 2015, ATG filed a Complaint against Adobe in King County Superior  
10 Court. Adobe removed the lawsuit to this Court on March 3, 2015, and filed a Motion to  
11 Dismiss on March 5, 2015. On March 18, 2015, ATG filed an Amended Complaint. On  
12 March 23, 2015, Adobe withdrew its Motion to Dismiss ATG's original Complaint. Dkt. #10.  
13 Adobe now moves to dismiss ATG's Amended Complaint pursuant to Federal Rule of Civil  
14 Procedure 12(b)(6).  
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### 16 III. DISCUSSION

#### 17 A. Legal Standard

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19 In making a Rule 12(b)(6) assessment, the court accepts all facts alleged in the  
20 complaint as true, and makes all inferences in the light most favorable to the non-moving party.  
21 *Baker v. Riverside County Office of Educ.*, 584 F.3d 821, 824 (9th Cir. 2009) (internal citations  
22 omitted). However, the court is not required to accept as true a "legal conclusion couched as a  
23 factual allegation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v.*  
24 *Twombly*, 550 U.S. 544, 555 (2007)). The Complaint "must contain sufficient factual matter,  
25 accepted as true, to state a claim to relief that is plausible on its face." *Id.* at 678. This  
26 requirement is met when the plaintiff "pleads factual content that allows the court to draw the  
27 reasonable inference that the defendant is liable for the misconduct alleged." *Id.* The  
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1 complaint need not include detailed allegations, but it must have “more than labels and  
2 conclusions, and a formulaic recitation of the elements of a cause of action will not do.”  
3 *Twombly*, 550 U.S. at 555. Absent facial plausibility, Plaintiff’s claims must be dismissed. *Id.*  
4 at 570.

5 Where a complaint is dismissed for failure to state a claim, “leave to amend should be  
6 granted unless the court determines that the allegation of other facts consistent with the  
7 challenged pleading could not possibly cure the deficiency.” *Schreiber Distrib. Co. v. Serv-*  
8 *Well Furniture Co.*, 806 F.2d 1393, 1401 (9th Cir. 1986).

9 The parties agree that this dispute is governed by Washington law under the terms of  
10 the Agreement. Dkt. #9 at 2; Dkt. #11 at 12.

### 11 **B. Consideration of Documents Outside the Complaint**

12 The Court may consider documents on a motion to dismiss if “the complaint necessarily  
13 relies upon a document or the contents of the document are alleged in a complaint, the  
14 document’s authenticity is not in question and there are no disputed issues as to the document’s  
15 relevance.” *Coto Settlement v. Eisenberg*, 593 F.3d 1031, 1038 (9th Cir. 2010).

16 The Court finds that the Software License Agreement, Dkt. #12-1, is necessarily relied  
17 upon by the Amended Complaint, the document’s authenticity is not in question, and there can  
18 be no dispute as to the document’s relevance. The Court will therefore rely on the Agreement  
19 in its analysis below. The Court finds that the Installation Guide and Technical Services Guide,  
20 filed by Defendant as Dkt. ## 12-2, 12-3, 12-4, and 12-5, are referred to but not “necessarily  
21 relied upon” by the Amended Complaint, and the Court declines to rely on such documentation  
22 for its 12(b)(6) analysis. Such documents, and the communications surrounding them, are  
23 properly raised as evidence at trial or summary judgment.  
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### C. Consideration of Extra-Contractual Statements

Before addressing Plaintiff's claims, the Court notes that Defendant repeatedly relies on the Agreement's so-called "No-Reliance" and "Integration" clauses to exclude consideration of any extra-contractual statements pled in the Amended Complaint. *See* Dkt. #11 at 8-9; 17; 19-20. Defendant argues that any statements made by it orally or in writing outside the Agreement are not binding under the Agreement's Integration Clause, because this clause clearly manifests the parties' intent to be bound only to the written Agreement for the full scope of the parties' duties, warranties, and obligations. Dkt. #11 at 9. Defendant argues that the No-Reliance clause in Section 9.4 of the Agreement prohibits a breach of warranty claim based on extra-contractual statements. Dkt. #11 at 17.

Under Washington law, the parol evidence rule requires that "all conversations and parol agreements between the parties prior to a written agreement are so merged therein that they cannot be given in evidence for the purpose of changing the contract or showing an intention or understanding different from that expressed in the written agreement." *United Fin. Cas. Co. v. Coleman*, 173 Wn. App. 463, 471-72, 295 P.3d 763 (2012) (quoting *Buyken v. Ertner*, 33 Wn.2d 334, 342, 205 P.2d 628 (1949)). The parol evidence rule, however, "only applies to a writing intended by the parties as an 'integration' of their agreement, *i.e.* a writing intended as a final expression of the agreement's terms." *Berg v. Hudesman*, 115 Wn.2d 657, 670, 801 P.2d 222 (1990) (citation omitted). "Where a contract is only partially integrated, *i.e.*, the writing is a final expression of those terms which it contains but not a complete expression of all terms agreed upon, the terms not included in the writing may be proved by extrinsic evidence provided that the additional terms are not inconsistent with the written terms." *Id.*

Defendant insists that the Court can dismiss Plaintiff's claims without considering extra-contractual statements because the Agreement was "clearly" integrated. *See* Dkt. #11 at

17. However, integration of a contract is generally a question of fact. *See S.D. Deacon Corp. of Washington v. Gaston Bros. Excavating*, 150 Wn. App. 87, 93, 206 P.3d 689 (2009) (citing *Emrich v. Connell*, 105 Wn.2d 551, 556, 716 P.2d 863 (1986)). “While boilerplate integration clauses can provide strong evidence of integration, they are not operative if they are premised on incorrect statements of fact.” *Id.* at 692-93 (citing *Denny’s Rests. v. Sec. Union Title Ins. Co.*, 71 Wn. App. 194, 203, 859 P.2d 619 (1993)). In determining whether an agreement is integrated, “the court may consider evidence of negotiations and circumstances surrounding the formation of the contract.” *Denny’s Rests.*, 71 Wn. App. at 202; *S.D. Deacon Corp.*, 150 Wn. App. at 93.

Whether or not the Agreement has been fully integrated is in dispute. *See* Dkt. #9 at 3-4 (“The intent of parties was that the [Agreement] would formalize their relationship, but the intent was not that the [Agreement] was the final or comprehensive embodiment of the terms of the transaction between the parties.”). The Court cannot, at this juncture, “consider evidence of negotiations and circumstances surrounding the formation of the contract,” nor can it determine questions of fact. *See S.D. Deacon Corp., supra* (holding that determining whether an agreement was fully integrated “is not the type of dispute that can be resolved in a summary proceeding...”). Instead, the Court must accept as true the facts of the Complaint. The Court thus assumes that the Agreement was partially integrated for purposes of this 12(b)(6) Motion, allowing for consideration of extrinsic terms not inconsistent with the written terms of the Agreement. *See Berg*, 115 Wn.2d at 670.

#### **D. Breach of Contract Claim**

Plaintiff’s Amended Complaint alleges that Defendant breached its duties under the Agreement in several ways. First, by failing to deliver Software that complied with “statements in the technical information and documentation that the Neolane Software would function on



1 computer systems using a MySQL database management system.” Dkt. #9 at 7. Second, that  
2 Defendant failed to timely provide the Software. Third, that Defendant failed to provide  
3 Software in the form previously represented by Defendant. Fourth, that Defendant failed to  
4 cause the Software to function on Plaintiff’s system as required by the Agreement. *Id.* Plaintiff  
5 also alleges a fifth breach: that Defendant “failed to provide the maintenance called for under  
6 the [Agreement].” *Id.* Plaintiff also alleges facts sufficient to show damages. *Id.* at 8.

8 A breach of contract claim requires Plaintiff to establish the following: (1) the contract  
9 imposes a duty; (2) the duty is breached; and (3) the breach proximately causes damage to the  
10 plaintiff. *Nw. Indep. Forest Mfrs. V. Dep’t of Labor & Indus.*, 78 Wn. App. 707, 712, 899 P.2d  
11 6 (1995).

13 Defendant moves to dismiss, arguing that the Amended Complaint “fails to specifically  
14 identify a contractual duty that Adobe breached.” Dkt. #11 at 12. Defendant argues that the  
15 fourth alleged breach should be dismissed because it is “plainly inconsistent with the terms of  
16 the Agreement,” citing to the disclaimer of warranty in Section 9.4 of the Agreement. *Id.* at 12-  
17 13. Defendant argues that the first alleged breach is impermissibly vague in referring to “a  
18 MySQL database” rather than “MySQL database version 5.0 or 5.1.” *Id.* at 13. Defendant  
19 argues that the second alleged breach should be dismissed because “the Agreement contains no  
20 provisions mandating a date for delivery of the Software.” *Id.* at 14. Defendant argues that the  
21 fifth alleged breach should be dismissed because “this claim is derivative of the other contract  
22 breach claims” and that Defendant “cannot be held liable for breaching the term of a  
23 maintenance provision when, through no fault of Adobe, the Software could not be installed on  
24 ATG’s system.” *Id.* at 14.

27 In Response, Plaintiff argues that its claim that Defendant failed to deliver Software  
28 complying with the technical information and documentation associated with the Agreement is

1 sufficient under the *Twombly/Iqbal* pleading standard. Dkt. #14 at 6-7. Plaintiff argues that it  
2 need not plead that the Software failed to operate on a MySQL 5.0 or 5.1 database as specified  
3 in the Agreement, because such particularity may be established after discovery at the time of  
4 trial or summary judgment. *Id.* at 7.

5 In Reply, Defendant argues that “[p]ost-*Iqbal* precedents require plaintiffs in breach of  
6 contract cases to identify the specific contractual term upon which the alleged breach is based,”  
7 citing *BP W. Coast Products, LLC v. Shalabi*, No. C11-1341MJP, 2012 WL 441155, at \*4  
8 (W.D. Wash. Feb. 10, 2012) (“A breach of contract claim must point to a provision of the  
9 contract that was breached.”).

10 The Court finds it odd that Plaintiff did not attach the disputed Agreement to its  
11 Complaint, and that its allegations do not cite to specific paragraphs or pages of that  
12 Agreement. However, under *BP W. Coast Products* Plaintiff is only required to “point to a  
13 provision of the contract that was breached,” not *cite* to such provision. For purposes of this  
14 Motion, the Court must accept all facts alleged in the Amended Complaint as true, and make all  
15 inferences in the light most favorable to Plaintiff. *Baker, supra*. Given that the Agreement has  
16 been submitted by Defendant, is already being relied upon and considered by the Court, and is  
17 cited to repeatedly in Defendant’s motion, Plaintiff need not cite to specific terms of the  
18 Contract in its Amended Complaint as long as the Court can understand the provisions Plaintiff  
19 is referring to in its specific allegations. The Court finds the Amended Complaint’s claim  
20 regarding the functioning of the Software on “a MySQL database” sufficient under  
21 *Twombly/Iqbal* when read with the remainder of the Complaint and the Agreement (Dkt. #12-  
22 1). Plaintiff’s breach of contract claim does not merely plead labels and conclusions or a  
23 formulaic recitation of the elements of a contract claim. The Court finds that the Amended  
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1 Complaint and the Agreement (Dkt. #12-1) contain sufficient factual matter to state a claim that  
2 is plausible on its face. Defendant's Motion will be denied as to this claim.

3 **E. Breach of Express Warranty Claim**

4 The Amended Complaint alleges Defendant "through its representatives and written  
5 materials, including the Software License Agreement, expressly warranted that the Neolane  
6 Software would function on the Accretive computer system as intended and designed, and that  
7 [Defendant] would cause it to so function on the Accretive computer system." Dkt. #9 at 9.  
8 This allegation does not match the language found in the Agreement's "Warranty" section.  
9 Dkt. #12-1 at 9. Plaintiff also alleges that Defendant "expressly warranted in the Software  
10 License Agreement that the Neolane Software would comply with the technical information  
11 and documentation made available when the Neolane Software was delivered." *Id.* This  
12 allegation matches the language found in the Agreement's "Warranty" section 9.1. Dkt. #12-1  
13 at 9. Plaintiff further alleges facts sufficient for breach and damages. Dkt. #9 at 9-10.

14 Defendant argues that these warranties contradict section 9.4 of the agreement, which  
15 states that "does not warrant that the functions contained in the Software will meet the  
16 requirements of Licensee or that the operation of the Software and updates will be error free.  
17 Additional statements such as those made in advertising or presentations, oral or written, do not  
18 constitute warranties by NEOLANE and should not be relied upon as such."  
19

20 That Defendant warranted under Section 9.1 that "the Software delivered... will  
21 substantially comply with the [technical] Documentation" cannot be questioned. As to the  
22 other alleged warranty, proceeding under the assumption that this contract was partially  
23 integrated, extra-contractual evidence that does not contradict terms of the contract may be  
24 considered, and be considered as true for the purposes of this 12(b)(6) Motion. The Court finds  
25 that Plaintiff's allegations that Defendant warranted that the Software would function on  
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1 Plaintiff's computer system, and that Defendant would cause it to function, do not directly  
2 contradict Section 9.4. All inferences in favor of the Plaintiff, Section 9.4 appears on its face to  
3 limit any warranty as to "functions" of the Software once it is operating, not to disclaim a  
4 warranty that the Software would function *at all*, or to disclaim a warranty that Defendant  
5 would cause the Software to function as part of installation. Plaintiff has thus stated a claim to  
6 relief that is plausible on its face and pled facts sufficient for the Court to draw the reasonable  
7 inference that the Defendant is liable under this claim. Defendant's Motion will be denied as to  
8 this claim.  
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#### 10 **F. Breach of Implied Warranty Claim**

11 The Amended Complaint alleges Defendant "implicitly and impliedly warranted" that  
12 the Software would function on Defendant's computer system as intended and designed, that  
13 Defendant would cause the Software to function, and that the Software would comply with the  
14 technical documentation." Dkt. #9 at 10. Plaintiff further alleges facts sufficient for breach  
15 and damages. *Id.* at 10-11.  
16

17 Disclaimer of an implied warranty requires that a seller's disclaimer be (1) conspicuous;  
18 (2) known to the buyer; and (3) specifically bargained for." *Burbo v. Harley C. Douglass, Inc.*,  
19 125 Wn. App. 684, 693, 106 P.3d 258 (2005).  
20

21 Defendant argues that all implied warranties are conspicuously disclaimed under section  
22 9.6 of the Agreement. Dkt. #11 at 16-17. Plaintiff appears to concede this point, arguing  
23 instead that this disclaimer was not specifically bargained for. Dkt. #14 at 15. This may be  
24 true, however facts supporting this contention are not pled in Plaintiff's Amended Complaint.  
25 Accordingly, the Court will grant Defendant's Motion as to Plaintiff's breach of implied  
26 warranty claim, and dismisses this claim without prejudice. Plaintiff may amend their  
27 complaint to include specific facts, if they exist, to satisfy the above elements.  
28

**G. Breach of Implied Covenant of Good Faith and Fair Dealing Claim**

The Amended Complaint alleges Defendant breached the implied covenant of good faith and fair dealing by failing to install and cause the Software to function on Plaintiff's computer system, failing to return Plaintiff's money paid after the Software would not function, failing to provide the Software to Plaintiff until nearly seven months after entry of the Agreement and upfront payment, failing to timely provide the technical documentation for the Software, and failing to provide the "technical servicing required by [the Agreement]." Dkt. #9 at 11-12. Plaintiff further alleges facts sufficient to show damages. *Id.* at 12.

Under Washington law, "[t]here is in every contract an implied duty of good faith and fair dealing" that "obligates the parties to cooperate with each other so that each may obtain the full benefit of performance." *Rekhter v. Dep't of Soc. & Health Servs.*, 180 Wn.2d 102, 112 (2014) (quoting *Badgett v. Sec. State Bank*, 116 Wn.2d 563, 569, 807 P.2d 356 (1991)). The implied covenant of good faith and fair dealing "cannot add or contradict express contract terms and does not impose a free-floating obligation of good faith on the parties." *Rekhter*, 180 Wn.2d at 113. Instead, "the duty [of good faith and fair dealing] arises only in connection with terms agreed to by the parties." *Id.* (citations omitted). The duty can arise "when the contract gives one party discretionary authority to determine a contract term." *Id.* (quoting *Goodyear Tire & Rubber Co. v. Whiteman Tire, Inc.*, 86 Wn. App. 732, 738, 935 P.2d 628 (1997)).

Defendant argues that this claim should fail because Defendant did not violate any term of the Agreement. Dkt #11 at 25-26. However, under Washington law, the duty of good faith and fair dealing can arise even when there is no breach of an express contract term. *See Rekhter*, 180 Wn.2d at 111-12 (2014) (citing to the Seventh Circuit for the proposition that "it is, of course, possible to breach the implied duty of good faith even while fulfilling all of the terms of the written contract"). The Washington Supreme Court noted in *Rekhter* that, if a

1 violation of the contract's terms were required, "[s]uch a requirement would render the good  
2 faith and fair dealing doctrine superfluous." 180 Wn.2d at 112. Defendant goes on to argue  
3 over specific facts and whether they could satisfy this duty. Dkt #11 at 26.

4 Plaintiff argues that Defendant's breach of this duty "comes not necessarily from its  
5 failure to cause the Software to work, but from its decision to keep the entirety of the money  
6 paid by Accretive even after admitting that the Software would never function." Dkt. #14 at  
7 24.  
8

9 The Court does not look to Plaintiff's limited briefing on this matter, but to the  
10 Amended Complaint itself to determine whether sufficient facts are pled. Taking all alleged  
11 facts as true and all inferences in favor of Plaintiff, Defendant's actions show a lack of  
12 cooperation under the terms of the Agreement so that Plaintiff could obtain the full benefit—  
13 any benefit—of its performance under the Agreement. Plaintiff has stated a claim to relief that  
14 is plausible on its face and pled facts sufficient for the Court to draw the reasonable inference  
15 that the Defendant is liable under this claim. Defendant's Motion will be denied as to this  
16 claim.  
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#### 19 **H. Negligent Misrepresentation Claim**

20 A claim for negligent misrepresentation requires the following elements: "(1) [that] the  
21 defendant supplied information for the guidance of others in business transactions that was  
22 false, (2) the defendant knew or should have known that the information was supplied to guide  
23 the plaintiff into the business transaction, (3) the defendant was negligent in obtaining or  
24 communicating the false information, (4) the plaintiff relied on the false representation, (5) the  
25 plaintiff's reliance was reasonable, and (6) the false information proximately caused the  
26 plaintiff damages." *Ross v. Kirner*, 162 Wn.2d 493, 499, 172 P.3d 701 (2007) (citing *Lawyers*  
27 *Title Ins. Corp. v. Baik*, 147 Wn.2d 536, 545, 55 P.3d 619 (2002)).  
28

1 Plaintiff's Amended Complaint alleges that, in the process of marketing its product to  
2 Plaintiff, Defendant made misrepresentations/omissions of material facts including "multiple  
3 statements, both oral and written, that the Neolane Software would work on Accretive's  
4 computer system, specifically the MySQL database upon which Accretive operates" and failing  
5 to inform Plaintiff of the limitations of the Software and the subsequent actions of Defendant to  
6 not live up to the express warranty provisions and procedures of the Agreement. Dkt. #9 at 12-  
7 13. Plaintiff also alleges that Defendant negligently misrepresented that the Software would  
8 function on Plaintiff's computer system, or failed to disclose the Software's limitations, at the  
9 time of and subsequent to the Agreement being entered. *Id.* at 13. Plaintiff alleges that  
10 Defendant "provided no information that contradicted its misrepresentations until long after  
11 entry into the Software License Agreement and upfront payment of the amounts payable  
12 thereunder." *Id.* Plaintiff further alleges facts sufficient to show damages. *Id.*

15 Defendant argues that Plaintiff must establish, by clear and convincing evidence, that it  
16 reasonably relied on false information that Defendant negligently communicated, citing to  
17 *Lawyers Title Ins. Corp.*, 147 Wn.2d at 545 (2002). Defendant argues that Plaintiff's claim that  
18 it relied on Defendant's statements that the Software would function on Plaintiff's computer  
19 system ("extra-contractual communications") is plainly unreasonable because the Agreement  
20 contained an Integration Clause and a warranty clause excluding reliance on statements made  
21 in advertising or presentations. Dkt. #11 at 19.

24 The Court disagrees with Defendant's apparent assertion that Plaintiff must establish  
25 clear and convincing evidence of reasonableness at this stage in the litigation. *See Solid 21,*  
26 *Inc. v. Breitling USA, Inc.*, 512 Fed.Appx. 685, 686-87 (9th Cir. 2013) (finding that "[w]hile a  
27 court may consider judicially noticeable facts in resolving a motion to dismiss... the inquiry  
28 under Rule 12(b)(6) is into the adequacy of the pleadings, not the adequacy of the evidence.").

1 The Court refuses to weigh reasonableness based solely on the Complaint and the Agreement,  
 2 given Plaintiff's allegation that Defendant made material statements outside the Agreement  
 3 before and after the Agreement was entered. *See* Dkt. #9 at 12-13. Taking these extra-  
 4 contractual statements as true, Plaintiff can meet all of the above elements of a claim for  
 5 negligent misrepresentation and has stated a claim to relief that is plausible on its face.

### 6 **I. CPA Claim**

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 8 Plaintiff's Amended Complaint alleges that Defendant's actions in this case violated  
 9 Washington's Consumer Protections Act, RCW 19.86, *et seq.* ("CPA"). Dkt. #9 at 13-15. In  
 10 order to make a claim under the CPA, Plaintiff must show: (1) an unfair or deceptive act or  
 11 practice; (2) occurring in trade or commerce; (3) that impacts the public interest; (4) causes  
 12 injury to the Plaintiffs' business or property; and (5) causation. *Hangman Ridge Training*  
 13 *Stables v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780 (1986). Under the *Hangman Ridge* test, a  
 14 plaintiff may base a CPA claim on a per se violation of statute, an act or practice that has the  
 15 capacity to deceive substantial portions of the public, or an unfair or deceptive act or practice  
 16 not regulated by statute but in violation of the public interest. *Klem v. Washington Mutual*, 176  
 17 Wn.2d 771, 787, 295 P.3d 1179 (2013). Plaintiff appears to base its CPA claim on the latter –  
 18 an unfair or deceptive act or practice not regulated by statute but in violation of the public  
 19 interest. "Ordinarily, a breach of a private contract affecting no one but the parties to the  
 20 contract is not an act or practice affecting the public interest." *Id.* (citing *Lightfoot v.*  
 21 *MacDonald*, 86 Wn.2d 331, 334, 544 P.2d 88 (1976)). Factors indicating public interest in this  
 22 context include: "(1) Were the alleged acts committed in the course of defendant's business? (2)  
 23 Did defendant advertise to the public in general? (3) Did defendant actively solicit this  
 24 particular plaintiff, indicating potential solicitation of others? (4) Did plaintiff and defendant  
 25 occupy unequal bargaining positions?" *Hangman Ridge*, 105 Wn.2d at 790-791. Further, to



1 establish the public interest element, there must be a real and substantial potential for repetition,  
 2 ““as opposed to a hypothetical possibility of an isolated unfair or deceptive act's being  
 3 repeated.”” *Michael v. Mosquera-Lacy*, 165 Wn.2d 595, 604-05, 200 P.3d 695 (2009) (quoting  
 4 *Eastlake Constr. Co., Inc. v. Hess*, 102 Wn.2d 30, 52, 686 P.2d 465 (1984)).

5 Even if all the specific facts pled by Plaintiff were true, Plaintiff has failed to meet the  
 6 public interest requirement. Plaintiff's conclusory and hypothetical statement that “there is a  
 7 likelihood that additional persons have been or will be injured” by Defendant because  
 8 Defendant is “a multinational corporation that licenses Software products to hundreds of  
 9 millions of users,” Dkt. #9 at 14, amounts to mere labels and conclusions impermissible under  
 10 the *Twombly/Iqbal* standard above. Plaintiff has already amended their Complaint once after  
 11 being put on notice of this deficiency. *See* Dkt. #6 at 15-16. The Court finds that any further  
 12 amendment to Plaintiff's CPA claim would be futile. Accordingly, the Court will grant  
 13 Defendant's Motion as to Plaintiff's CPA claim, and dismisses this claim with prejudice.  
 14

#### 15 **J. Unjust Enrichment Claim**

16 Plaintiff's Amended Complaint alleges in the alternative that Defendant's actions in this  
 17 case resulted in unjust enrichment. Dkt. #9 at 15. Plaintiff further alleges facts sufficient to  
 18 show damages. *Id.*

19 A claim for unjust enrichment requires the following elements: (1) a benefit conferred  
 20 upon the defendant by the plaintiff; (2) knowledge by the defendant of the benefit; and (3) the  
 21 defendant retains the benefit under circumstances that make it inequitable to do so. *Young v.*  
 22 *Young*, 164 Wn.2d 477, 484, 191 P.3d 1258 (2008).  
 23

24 Under the allege facts, Defendant clearly obtained a benefit in the form of the \$534,530  
 25 paid upfront by Plaintiff. Dkt #9 at 3. Defendant clearly had knowledge of this benefit from  
 26 the time of the Agreement through the delivery of the incompatible Software, through the  
 27

1 attempts to resolve the incompatibility, and to the time of Plaintiff filing suit. The  
2 circumstances described by Plaintiff, if true, make a plausible case for inequity.

3 Plaintiff's unjust enrichment claim is not "merely a re-pleading of the breach of contract  
4 claim under a different name," as argued by Defendant at Dkt. #18 at 13. Plaintiff has pled  
5 sufficient facts in this case to for the Court to draw the reasonable inference that the Defendant  
6 was unjustly enriched. As such, the Court will deny Defendant's motion to dismiss this claim.  
7

#### 8 **IV. CONCLUSION**

9 Having reviewed the relevant pleadings, the declarations and exhibits attached thereto,  
10 and the remainder of the record, the Court hereby finds and ORDERS:

11 1) Defendant's Motion to Dismiss (Dkt. #11) is GRANTED IN PART AND DENIED  
12

13 IN PART as follows:

14 a. Defendant's Motion to Dismiss Plaintiff's breach of contract claim is  
15 DENIED.

16 b. Defendant's Motion to Dismiss Plaintiff's breach of express warranty claim  
17 is DENIED.

18 c. Defendant's Motion to Dismiss Plaintiff's breach of implied warranty claim  
19 is GRANTED without prejudice.

20 d. Defendant's Motion to Dismiss Plaintiff's breach of the implied covenant of  
21 good faith and fair dealing claim is DENIED.

22 e. Defendant's Motion to Dismiss Plaintiff's negligent misrepresentation claim  
23 is DENIED.

24 f. Defendant's Motion to Dismiss Plaintiff's violation of the Consumer  
25 Protections Act claim is GRANTED with prejudice.  
26  
27  
28

1 g. Defendant's Motion to Dismiss Plaintiff's unjust enrichment claim is  
2 DENIED.

3 2) If Plaintiff wishes to amend its Amended Complaint with respect to its claim for  
4 breach of implied warranty, it is permitted to do so within fourteen (14) days of the  
5 date of this Order.  
6

7 DATED this 17 day of August, 2015.

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10 RICARDO S. MARTINEZ  
11 UNITED STATES DISTRICT JUDGE  
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